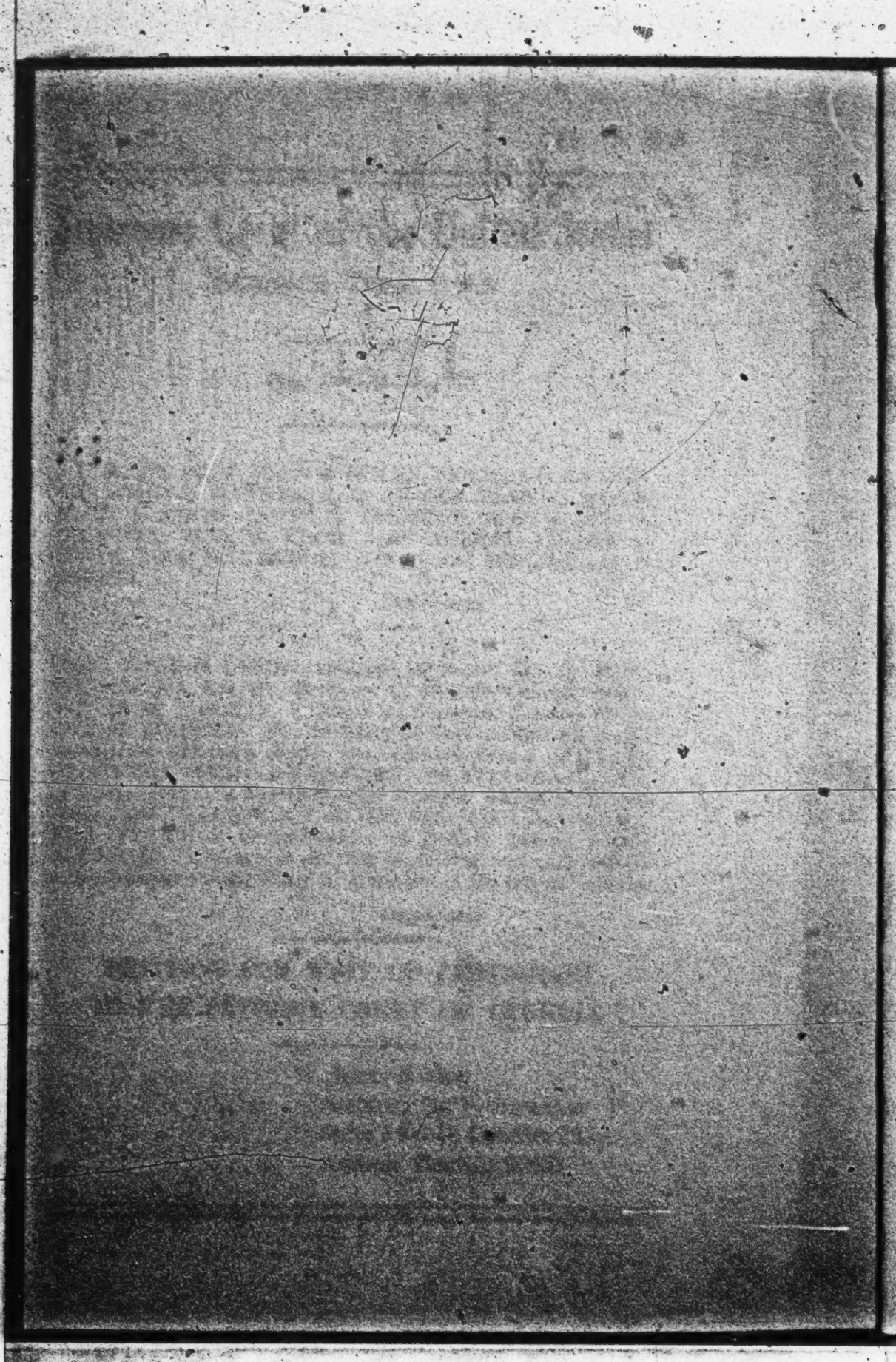

SUPREME COURT, U. S. No. 365
SEP 11 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, ET AL.,
Appellants,

—against—

ARTHUR I. HEMMINGS, ET AL.,
Appellees.

HERMAN W. BEVIS, ET AL.,
Appellants,

—against—

MARK W. EASTLAND, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA
BRIEF OPPOSING MOTION TO DISMISS

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September 11, 1967.

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In the

Supreme Court of the United States

October Term, 1967

Hugh Miller Muench, *et al.*,
Appellants,

—*against*—

Arthur I. Hemmings, *et al.*,
Appellees.

Herman W. Bevis, *et al.*,
Appellants,

—*against*—

Mark W. Eastland, *et al.*,
Appellees.

No. 405

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OPPOSING MOTION TO DISMISS

The most significant feature of the Board's Motion to Dismiss is its recognition by silence of the accuracy of appellants' central contentions that (a) the statutory scheme as construed and applied excludes Free Thinkers from Florida and will prevent it from ever [illegible] the work required by its Legislative Reapportionment Act through supervision and control of the [illegible] certified nominations [illegible] power [illegible] for the [illegible]

the true purpose of that scheme is simply economic protectionism.

Instead, the Motion seeks to divert attention from those fundamental concessions by distortion of the facts and by argument relying on inapplicable authorities.

1. *Facts.* The Motion to Dismiss seeks to convey an impression that there are six national accounting firms which seek a special exemption only for themselves from Chapter 473, Florida Statutes, that they have sneaked "surreptitiously" into Florida, and are somehow endangering the Florida public. That is simply not the case.

This litigation is of interest and importance to the entire interstate accounting profession. When the Board in 1962 sealed off the last avenue open to any meaningful form of Florida practice by all but the three "grandfathered" firms, it was Price Waterhouse, having the necessary resources and endurance, which took the lead in instituting litigation. Thereafter, it and five other national firms with substantial client activity in Florida joined in seeking a legislative remedy that would have benefited not merely them but all firms engaged in interstate practice. (That remedy, for example, would have permitted a medium-sized Atlanta firm to serve its Georgia clients with operations in Florida through a resident Florida-certified partner.)* In addition,

* The Board's statement (p. 9) that "the six" national firms sought to be exempted" from F. S. 473.16, and that the 1967 Florida Legislature "considered" their proposal and "decided" to reject it is just not so. There are other national firms besides the [illegible] interest in legislation in Tallahassee; the proposed [illegible] would have benefited [illegible] and would have benefited [illegible] with practices extending [illegible] Florida, and the 1967 Florida Legislature did not consider the proposal [illegible] was rejected out of hand by the House Committee [illegible] Senate Judiciary Committee on a vote of the [illegible] Florida Institute of Certified Public Accountants [illegible]

the other national and smaller interstate firms are also concerned about, and vitally interested in, the questions raised in this litigation.*

Equally concerned, we assume, will be the Securities and Exchange Commission once appellants are excluded, in view of the prohibitions contained in F. S. 473.16 (emphasized by the implementing Chapter 20-10 of the Board Rules) against effective control and supervision of a Florida representative or correspondent, which make it impossible to comply with "generally accepted auditing standards."**

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*Witness the action taken late in 1965 by the American Institute of Certified Public Accountants, over the objection of members from a few southern states, appointing an investigating committee made up of practitioners not associated with national firms who were instructed to lend their good offices in an effort to resolve the unique "Florida situation." This committee interviewed the members of the Florida Board and representatives of the Florida Institute and ultimately reported that it saw no way out of the deadlock. It concluded its report thus:

> "It would appear, therefore, that until there is more sentiment among Florida CPAs favoring adoption of the attitude of the other 52 jurisdictions toward interstate practice, there will continue to be an unresolved problem as to how an out-of-state firm can effectively conduct a public accounting practice of any volume within the State of Florida." REPORT OF SPECIAL COMMITTEE ON "FLORIDA SITUATION" TO MEMBERS OF COUNCIL OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, May, 1966 (unpublished).

**Rule 2-02 of SEC Regulation S-X requires that financial statements be prepared in accordance with those standards. 17 C.F.R. § 210.2-02(b). The current compilation and definition of generally accepted auditing standards is contained in the American Institute of Certified Public Accountants' Auditing Standards and Procedures. The affected auditing standards, as set forth in that document, are as follows:

> "310 Before he authorizes the issuance of another accountant's opinion [illegible] the principal auditor should make such inquiries or adopt such procedures as, in his judgment, are appropriate in the circumstances to satisfy himself as to the professional reputation of the other auditor. He should also [illegible] whether the other auditor is aware of the relationship of his activities with those of the other independent auditor to achieve a proper coverage of the ongoing examination

Nor have appellants acted "surreptitiously" in Florida. Their practice in that state since 1906 is a matter of record and has never been criticized nor said to have harmed the Florida public. But when confronted after the War with a growing demand for services in Florida and a statute that conditioned permanent certification on the mass movement of all partners to Florida and two years' apprenticeship there for each, they naturally sought ways of mitigating the apparent impact of Chapter 473. One was through ten years of futile negotiation with the Board (Ex. 10, p. 81). Another was the formation of a subsidiary partnership made up of the senior partner, financial partner, and Atlanta partner of the parent firm and the resident manager in Miami who was not then qualified for membership in the parent firm.

Such a subsidiary partnership arrangement has been used in a few other jurisdictions, but the Board's Motion (p. 3) seems to attach pejorative significance to its creation and even implies that it has continued in existence and been an important part of this litigation. In fact, it never came fully into existence, because the final step under F. S. 865.09 of filing in the circuit court was not taken. More important, it never came into operation because, as the Board was informed prior to suit, it was awaiting the approval of the Board.*

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* solicitation of the financial statements, such as arrangements for continuing the company's distribution of intercompany transactions, elimination of intercompany profits, etc. In some cases he may need to make investigations to, or make particular audit tests, the other independent auditor. Despite the fact that the other independent auditor remains responsible for the performance of his own work and for his opinion, and the principal auditor assumes no responsibility in this connection [illegible] Paragraph 34 of S. [illegible] CAP[illegible]

[illegible] Manuscript of [illegible] pp. 18-19.

Accordingly, appellants were forced to continue reliance on temporary certificates to cover their expanding volume of work in Florida, utilizing resident managers and staff. (The Board responded by adopting Rule 20-9.03 and threatening to withhold temporary certificates, the subject for this litigation.) Appellants made no attempt, in professional circles, to hide the existence of their Florida work spaces; indeed, those work spaces were called to the Board's attention no later than June 6, 1962 by Mr. Daly's application for a reciprocal certificate, as the Board's Motion (p. 3) appears to recognize. The only thing "surreptitious" about their activities was their rigorous effort to insulate themselves from the Florida public (Jurisdictional Statement, at 8). At the time, the leading interpretation of Chapter 473 was contained in *Florida Accountants Association v. Dandelake*, 98 So. 2d 323 (Fla. 1957), suggesting that the accountancy law was essentially a "holding out" statute designed to protect the Florida public from misrepresentation. As a result, appellants went to exceptional pains to avoid any appearance of holding themselves out as fully licensed in Florida, and the circuit court in its first decree in *Mercer v. Hemmings* entered no contrary finding on that score (App. A, p. 43a).

On the first appeal, the Supreme Court of Florida held that Chapter 473 regulated as well the actual practice of certified public accountants in Florida and therefore was applicable to appellants even if they did not hold themselves out (App. A, pp. 33a-34a). At that same time, however, by striking down the apprenticeship requirements (and at that point seemingly the residence requirement), the court appeared to offer one law alternative to abandonment of appellants' practice in Florida, namely, [illegible] all the partners under Chapter 473. Since the Board and the court below in *Davis v. Eastfield* have now eliminated [illegible]

off that route as well, appellants' only recourse is constitutional adjudication in this Court. They have thus gone to remarkable lengths to find some sort of workable accommodation under Florida's regulatory scheme and, in the process, to test its constitutionality in every possible application.*

2. *Argument.* The basic fallacy in the Board's abbreviated argument stems from its unwillingness to distinguish between an attack on a single provision of a statute in isolation and an attack on the application of a statute as a whole. Even the court below, as far back as the first opinion in

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*The Board has also injected for the first time elliptical references to appellants' "trade name" (p. 2), going so far as to assert that the question presented is whether appellants are entitled to an exemption enabling them to practice in Florida "under a fictitious trade name" (p. 5). In fact, appellants are the living American successors of the original London partnership of Samuel Lowell Price, William Hopkins Holyland, and Edwin Waterhouse, formed in 1865. After Holyland's retirement, the firm name was changed nine years later to Price, Waterhouse & Co. *See* DICKINSON, PRICE, WATERHOUSE & Co. IN AMERICA 1, 5 (1951).

Moreover, appellants are not seeking to introduce their name into the state through some sort of nefarious scheme as the Board implies; rather, as shown overwhelmingly by this record, they seek to perform the necessary accounting *work* for their interstate clients with operations in Florida. This they cannot do, says the court below, nor can they even supervise the work of local Florida accountants who might act in their behalf, says Chapter 20-10 of the Board Rules (App. A, pp. 62a-66a)—obviously directed at a great deal more than the mere use of a firm name.

Concluding its Statement of the Case (pp. 4-5), the Board declares that, despite the decisions below, appellants, "still uncertificated by Florida, continue to engage in a year-round practice through their offices in Florida, staffed by full-time residents of Florida." In fact, appellants have never operated in violation of law or contrary to any order. They have been able to continue their peculiar form of practice in Florida only by virtue of judicial stays and, when the stays were about to expire, by virtue of assurances given to Mr. [illegible] in April, 1967, in connection with appellants' applications, that the status quo would not be altered during the pendency of this appeal.

Mercer v. *Hemmings*, recognized that appellants were challenging the "Act, as a whole" (App. A, p. 39a).

In line with its refusal to recognize this distinction, the Board points on the one hand to cases such as *LaTourette* v. *McMaster*, 248 U. S. 465, that have sustained isolated residence requirements, and on the other to the few states with counterparts to F. S. 473.16 requiring certification of all partners. But it ignores the fact that not a single one of those statutes couples a residence requirement with a provision comparable to F. S. 473.16 and that instead each offers a less restrictive alternative, *e.g.*, a resident partner arrangement, the liberal grant of reciprocal certificates to all partners, or certification of a subsidiary partnership.

It is thus noteworthy that the Board has devoted not a word to the companion appeal, *Bevis* v. *Eastland*, in which appellants took the final step ostensibly open to them under the statute by seeking mass certification of all partners under F. S. 473.19, and in which they were peremptorily rejected. In short, as a result of fully litigating these two cases, appellants have shown that there are simply no remaining openings in Florida's regulatory scheme—notwithstanding those openings exist, in one form or another, in all the other states and in the Model Bill adopted by nineteen states.

The failure to grasp the nature of appellants' constitutional challenge also explains the Board's continued reliance (p. 5) on *Morgan* v. *Oosterhoudt*, 96 So. 2d 139 (Fla. 1957), *appeal dismissed*, 355 U. S. 603, where Chapter 473 was not attacked nor tested as a whole (but only F. S. 473.16 and the related penalty provision, F. S. 473.23). Furthermore, the case was fully disposed of on the pleadings alone by summary judgment; there was no allegation and no showing of a client need that could not be satisfied by occasional temporary certificates or of an attempt to seek per-

manent certification by any of the plaintiff's nonresident prospective partners (the members of Peat, Marwick, Mitchell & Co.). Indeed, the plaintiff's argument in the state courts was based on statutory construction and he did not even pursue an attack on constitutional grounds (other than an alternative argument based on his freedom of contract) except for two conclusional sentences inserted in a petition for rehearing filed in the Florida Supreme Court after the adverse decision on appeal. *See* Appendix to Jurisdictional Statement, No. 623, October Term, 1957, at 11a-12a; Appellees' Motion to Dismiss, at 6-8.

Of the same cast is the Board's reliance on an alleged form of discrimination that is envisioned in the event Chapter 473 is struck down. The discrimination involved in the rather ancient plumbers' cases cited by the Board (p. 7) had to do with resident craftsmen, the court refusing in each case to favor resident *firms* at the expense of resident *individuals*. That is quite different from the actual discrimination now sanctioned by Chapter 473 in requiring all of the Price Waterhouse partners around the world to give up their practice elsewhere and move to Florida, when each of them is certified by one or more States and they are perfectly willing to submit a resident general partner—who would meet all of the present-day Florida perequisites for certification—to the jurisdiction of the state and of the Board. The professional conduct of such a partner, of course, would be binding upon his nonresident partners, affording full protection to the Florida public. It is difficult to understand, therefore, what "seems obvious to the Board" (p. 7), namely, "that the power and the responsibility of the State Board to enforce Florida's educational and ethical standards would thereby be completely thwarted." Presumably at least some of the other forty-nine states are interested in enforcing their own educational and ethical standards, yet the

Board points to no evidence that these states have been "thwarted" by their assimilation of partners of national and other interstate firms.

Finally, the Board suggests (p. 9) that appellants' arguments would be better addressed to the Congress, citing *Sperry* v. *Florida*, 373 U. S. 379 (noted, Jurisdictional Statement, at 26). Suffice it to say that, in addition to the supremacy clause, it has been the historic function of this Court to enforce just as vigorously the commerce clause and the fourteenth amendment. *See, e.g.*, Givens, *The Commerce Clause and the Interdependent Economy*, 53 A. B. A. J. 719, 720 (1967).

As we have pointed out, the most significant feature of the Motion to Dismiss is what it does not say. It silently concedes that Price Waterhouse is to be excluded from Florida and will no longer be able to perform in Florida, or even supervise, the work required by its interstate clients. The silence on this subject, on its quasi-judical proceedings in *Bevis* v. *Eastland*, and on any arguable police power justification for the exclusionary scheme, is perhaps representative of the Board's cavalier attitude throughout the litigation. The Board has overlooked what has been a basic postulate of English constitutional history—later incorporated in some of the underlying notions of our own due process clause—ever since the College of Physicians refused to license Dr. Bonham and then imprisoned him for his unlawful practice of medicine: "No man shall be a judge in his own cause." *Bonham's Case*, 8 Co. Rep. 107a, 118a (1610). In any event, it is hard to perceive how even this self-interested Board can deny that the challenge to Chapter 473 on these appeals presents a substantial federal question.

CONCLUSION

The Motion to Dismiss should be denied and this Court should note probable jurisdiction of the questions presented.

Respectfully submitted,

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